JUN 13 1955
HAROLD B. WILLEY, Cle

No. 54

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

JACK GREEN AND GENERAL LABORERS' LOCAL NO. 397 OF GRANITE CITY, A LABOR UNION AND VOLUNTARY ASSOCIATION OF WORKINGMEN AFFILIATED WITH INTERNATIONAL HOD CARRIERS BUILDING AND COMMON LABORERS UNION OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR WANT OF JURISDICTION

SIMON E. SOBELOFF,
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Washington 25, D. C.

INDEX

	Page
Cases:	
Hale v. United States, 89 F. 2d 578	7
United States v. Cook, 17 Wall. 168	7
United States v. Stone, 308 U.S. 519	2
Statute and Rule:	
18 U.S.C. 1951(c)	2, 6, 7
Rule 29(b), F.R. Crim. P.	2
Miscellaneous:	
16 *U. of Pitt. L. Rev.* 101	2

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1. Appellees' motion to dismiss this appeal as not within the jurisdiction of this Court under 18 U. S. C. 3731 rests upon the contention that the district court, while purporting to grant appellees'

motion in arrest of judgment, did in fact grant a motion *non obstante verdicto*.[1] They argue that the references by the trial judge in his memorandum opinion to the "facts" of this case establish that the order was grounded upon a consideration of the evidence and not upon a construction of the Anti-Racketeering statute. The insubstantial nature of this argument is laid bare by reading the entire memorandum opinion of the district court in the light of the "facts" set forth in the indictment.

It is true, as petitioners argue, that this Court, in determining its jurisdiction over appeals under 18 U. S. C. 3731, will look to the substantial nature and legal effect of the order appealed rather than to its nomenclature. In the instant case, however, the district court left no room to question the nature of the order it entered and the reasons that compelled it to do so when it stated (Statement as to Jurisdiction, pp. 15-16):

> * * * The motions for judgment of acquittal and for new trial are denied, but the Court is of the opinion that the motion in arrest of judgment should be allowed for the following reasons:

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[1] While judgments *non obstante verdicto* were possibly not known in criminal cases at the common law (16 *U. of Pitt. L. Rev.* 101, at 107), their use in federal criminal cases after verdict to question the sufficiency of the evidence to support the verdict was upheld in the evenly divided opinion in *United States v. Stone*, 308 U.S. 519, entered before the adoption of the Federal Rules of Criminal Procedure. Under Rule 29(b), F. R. Crim. P., the sufficiency of the evidence may be questioned after verdict by a motion for judgment of acquittal.

are general comments which could have been made even if there had been no trial, as a means of demonstrating the court's construction of the statute. By alleging the use of force and violence to obtain money from the victims, the Government negated the existence or relevance of any contract in this case. The words of the judge clearly refer to a general situation posed to test statutory construction, not to the specific evidence in this case.

Thus, not only in nomenclature, but in reality, the order of the district court was in arrest of judgment.

2. The only issue raised on this appeal, as set forth in the jurisdictional statement, is:

> Whether the obstruction of interstate commerce or the attempt to do so by the wrongful use of actual and threatened force, violence and fear, in an attempt to compel an employer to pay wages for imposed, unwanted, superfluous and fictitious services of laborers, is a violation of 18 U. S. C. 1951.

Appellees contend that since 18 U. S. C. 1951 contains in subsection (c) certain limitations to its proscriptions,[3] it is not possible to obtain a proper construction of the statute on this appeal from an indictment which does not by its terms negate the

[3] The subsection provides: "This section shall not be construed to repeal, modify or affect section 17 of Title 15, section 52, 101-118, 151-166 of Title 29 or sections 151-188 of Title 45."

applicability of the exceptions. Appellees admit that the indictment need not negate these exceptions, which are in the nature of affirmative defenses,[4] and that a motion in arrest of judgment does not reach such defenses, but argue that it is necessary to consider the evidence to determine whether the affirmative defenses of subsection (c) are applicable to this case.

This argument, however, misconstrues the issue before this Court to be that of guilt or innocence whereas the question is solely the construction of the statute as applied to the facts alleged in the indictment. A decision by this Court on the motion in arrest of judgment does not necessarily decide the whole case. If the judgment of the district court granting the motion in arrest should be reversed and the verdict reinstated, appellees would still have a right of appeal to the court of appeals from the judgment of conviction. All issues remaining in the case, such as the sufficiency of the evidence to support the Government's case or the applicability of the claimed affirmative defenses, would be open for consideration at that time. What is involved here is merely the specific ground on which the court arrested judgment, not the whole case.

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[4] *United States v. Cook*, 17 Wall. 168; *Hale v. United States*, 89 F. 2d 578 (C.A. 4).

CONCLUSION

It is respectfully submitted that for the foregoing reasons the motion to dismiss this appeal for want of jurisdiction should be denied:

SIMON E. SOBELOFF,
Solicitor General.

JUNE, 1955.